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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EDWARD C. TIDWELL,

Plaintiff and Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION,

Defendant and Respondent.

A130651

(Contra Costa County
Super. Ct. No. C10-02022)

Plaintiff has filed the present appeal from the trial court's order that granted defendant's motion for relief from default. We conclude that defendant was entitled to relief from default under the mandatory provisions of Code of Civil Procedure section 473, subdivision (b), and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff filed a complaint for damages against defendant Cal-Western Reconveyance Corporation (defendant or Cal-Western), along with numerous other named and doe defendants, on July 8, 2010. All of the multiple causes of action of the complaint relate to a nonjudicial foreclosure proceeding initiated on plaintiff's real property located on Roundup Way in Antioch.

Plaintiff served the complaint on Cal-Western on July 21, 2010. The law firm of "Pite Duncan, LLP" was retained to represent defendant in plaintiff's action, but did not file a response to the complaint on behalf of defendant within the time provided by law,

August 20, 2010 (Code Civ. Proc., § 412.20, subd. (a)(3)). A default was entered against defendant at plaintiff's request three days later.

After defendant's counsel learned of the entry of default on August 27, 2010, she left a message for plaintiff with "a request to set aside the default or stipulation to a non-monetary judgment." On August 30, 2010, plaintiff declined, and replied with demands – including a stipulation to rescind the trustee's foreclosure sale, and a satisfactory monetary settlement – that "were not acceptable" to defendant.

Defendant filed a motion for relief from default on September 3, 2010, based on both the mandatory and discretionary provisions of Code of Civil Procedure section 473 (section 473). The supporting declaration of defendant's counsel states that the failure of Cal-Western to file a timely response to plaintiff's complaint was "due to inadvertence and oversight" of counsel.

Following a hearing on October 19, 2010, the trial court entered an order granting defendant's motion to set aside the default. Included in the order was a provision that directed defendant to "file a Declaration of Non-Monetary Status, or other responsive pleading, on or before October 29, 2010." This appeal followed.

DISCUSSION

Plaintiff claims that the trial court erred by granting defendant's motion for relief from default. He argues that the complaint was "properly served" on Cal-Western's agent for service of process, and defendant failed to establish a "satisfactory excuse" for the default.

"Section 473, subdivision (b) provides for two distinct types of relief. Under the discretionary relief provision, on a showing of 'mistake, inadvertence, surprise, or excusable neglect,' the court has discretion to allow relief from a 'judgment, dismissal, order, or other proceeding taken against' a party or his or her attorney." (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 615–616; see also *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1442; *Lorenz v. Commercial Acceptance Ins. Co*. (1995) 40 Cal.App.4th 981, 989.) "Subdivision (b) of section 473 also includes an 'attorney affidavit,' or 'mandatory,' provision. It states in

pertinent part: 'Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is [timely], is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any . . . resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' " (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608; see also *Esther B. v. City of Los Angeles* (2008) 158 Cal.App.4th 1093, 1099.)

Defendant requested relief from default under both the discretionary and mandatory provisions of section 473 subdivision (b), but produced an attorney declaration that did not support discretionary relief under the statute. Defendant's counsel stated only that she was retained to represent defendant before expiration of the time limit to file a response to the pleading, but "missed the deadline" due to "inadvertence and oversight." Nothing in the nature of *excusable* mistake, inadvertence, surprise, or neglect is found in the attorney's declaration. " 'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.' [Citation]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) Without a declaration attesting to some form of counsel's excusable neglect associated with failing to file a response, discretionary relief was not available to defendant. (*Ibid*.)

The distinct mandatory relief provision of section 473, subdivision (b), grants relief from default " 'whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect.' [Citation.] 'The range of attorney conduct for which relief can be granted in the mandatory provision

is broader than that in the discretionary provision, and includes inexcusable neglect. . . .' [Citation.]" (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 258.) "Furthermore, the defaulting party must submit sufficient admissible evidence that the default was actually caused by the attorney's error. [Citation.] 'If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief.' [Citation.]" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1414.)

The sworn affidavit of defendant's attorney attests to her "inadvertence and oversight" as the reason a response was not timely filed. The affidavit further indicates that counsel was retained to represent defendant and received the complaint "prior to the deadline for filing a response," which adequately demonstrates the necessary element that the default was actually caused by the error of counsel rather than the omission or neglect of defendant. Contrary to plaintiff's claim, the neglect or inadvertence of counsel need not be excusable to obtain relief. For purposes of "section 473, subdivision (b), ' "[r]elief is mandatory when a complying affidavit is filed, even if the attorney's neglect was inexcusable." [Citation.]' [Citation.]" (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 401.)[1]

Finally, once defendant learned of the entry of default on August 27, 2010, the application for mandatory relief was filed diligently – essentially within a week – and was in proper form. Plaintiff complains that the motion was "not fully executed," apparently due to the lack of a signature of counsel on the supporting memorandum of points and authorities. However, the supporting affidavit of fault was properly signed by counsel under penalty of perjury as required by section 473, subdivision (b), as was the

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1 In his opening brief plaintiff refers to defendant's answers to his interrogatories as evidence that defendant made a tactical "decision to stall" and somehow "knowingly defaulted." The answers to interrogatories were not before the trial court when the ruling on the motion was made, and thus have no bearing on our review of the propriety of the trial court's decision to grant relief. In any event, the interrogatory responses reveal that Cal-Western forwarded plaintiff's complaint with a request for representation to the Pite Duncan law firm on August 14th, and two days later received an acknowledgment from the law firm of receipt of the complaint and an assignment of two attorneys to the case. Far from proof of a knowing default by defendant, the interrogatory responses support the showing of neglect by retained counsel.

notice of motion for relief from default. The lack of signature on the memorandum of points and authorities does not render the affidavit of fault defective.

Plaintiff also points out that Exhibit A, attached to defendant's declaration of nonmonetary status, refers to a property and substitution of trustee document recorded in Riverside County, rather than plaintiff's property, which is the subject of the nonjudicial foreclosure proceeding in Contra Costa County, as specified in the declaration. He therefore argues that the motion was "faulty and defective" in form, and must be denied. The attachment to the declaration of nonmonetary status of an incorrect substitution of trustee document is not fatal to the motion for relief from default. The declaration was included by defendant to assert a meritorious defense to the action.[2] The declaration itself properly identifies the deed of trust and substitution of trustee associated with plaintiff's property. Moreover, Code of Civil Procedure section 473, subdivision (b), now provides that "No affidavit or declaration of merits shall be required of the moving party." Defendant was not required to attach the correct substitution of trustee document to demonstrate a meritorious defense. (See *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1142–1143.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.

[2] In a declaration of nonmonetary status, which can be filed at any time after a trustee is named as a defendant in an action, "the trustee states its reasonable belief that it is named as a defendant in an action solely in its capacity as trustee and not due to its acts or omissions. The trustee may thereby avoid participation in the lawsuit unless another party objects, and also avoid liability for damages and attorney fees." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 350.)